IN THE

Supreme Court of the United States

October Term, 1965

No. 210

JAMES T. STEVENS,

Petitioner,

—v.—

CHARLES A. MARKS, Justice of the Supreme Court of New York, County of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT IN THE COUNTY OF NEW YORK

No. 290

JAMES T. STEVENS,

Petitioner,

—v.—

JOHN J. McCLOSKEY, Sheriff of New York City,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

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BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief amicus curiae, in support of the position of the petitioner James T. Stevens, is respectfully submitted by the Superior Officers Council of City of New York Police Department. The interest of the amicus curiae is stated in our motion for permission to file this brief.

Summary of Argument

1. All of the courts below in this litigation have been of the view that *Regan* v. *New York*, 349 U.S. 58, is con-

trolling against the position of the petitioner James T. Stevens, in that both in *Regan* and in this case the respective petitioners repudiated as constitutionally defective a waiver of immunity, each was thereafter adjudged in contempt of court for refusal to testify before a State Grand Jury, and each was found (by the lower courts here—and by this Court in *Regan*) to be without justification in refusing to testify because each had an absolute immunity under State law. The actual fact is, however, that while *Regan* involved State immunity legislation which did indubitably and *automatically* confer upon the petitioner an absolute immunity against State prosecution if he were to testify, in this case the situation is radically and dispositively different because the New York State immunity legislation which was applicable at the time of the *Regan* happenings has since been amended, so that now the New York State immunity legislation is of the selective and discretionary type rather than of the automatic or self-executing type. It follows that the present petitioner Stevens is entitled to claim justification for refusing to testify, notwithstanding the *Regan* decision, because it is a matter of pure speculation as to whether he will ever have New York State immunity. Indeed, judging by the strenuously declared determination of the prosecuting authorities throughout this case that Stevens is not to expect immunity, the supposed prospect of his obtaining immunity under the changed statutory system in New York for merely selective and discretionary immunity is not a meaningful prospect for the purposes of this case. The point summarized in this paragraph has thus far apparently not been noticed by any of the Courts below or by the parties in this litigation.

2. There exists also, under New York court-decisional law interpreting the New York State constitutional protection of the privilege against self incrimination, a doctrine that a prospective defendant who is brought and required compulsorily to testify before a Grand Jury, has thereby *ipso facto* suffered a violation of his privilege against self-incrimination, and is entitled to dismissal of any indictment derived from such compelled Grand Jury testimony. It is important for a full consideration of the issues of this case that this New York State decisional rule—which has not thus far been noticed, apparently, in this litigation—should not be simplistically or erroneously taken to mean that the petitioner Stevens enjoys an automatic State immunity in a sense of sufficient completeness for the purposes of this case. The New York decisional rule, upon examination, is found to be not a rule of complete immunity, but it is a rule which leaves the defendant (or prospective-defendant Grand Jury witness) subject to subsequent re-indictment based upon sufficient evidence not derived from the unconstitutionally compelled testimony. Besides, this incompleteness in the "immunity" conferred under the New York State decisional rule is rendered even more incomplete for *Federal* constitutional purposes when consideration is had of this Court's decisions in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 and *Malloy* v. *Hogan,* 378 U.S. 1, establishing a requirement of completely mutualized immunity against Federal and State incrimination tested by Federal Fifth Amendment standards; and when consideration is had of subsequent Federal court decisions holding in the most emphatic terms that the New York decisional rule in question does not and cannot create Federal immunity under Fifth Amendment standards.

ARGUMENT

POINT I

The case of *Regan* v. *New York*, 349 U.S. 58, which has been deemed by all of the Courts below to be controlling against the position of the petitioner James T. Stevens, is not controlling because the *Regan* decision turned dispositively upon a therein operative "automatic immunity" New York statute which is now no longer in existence, and the New York State Immunity Legislation which needs to be considered for the present case is a selective and discretionary (rather than "automatic") immunity system. This statutory change means that the within petitioner Stevens, unlike the petitioner in the *Regan* case, can claim justification for refusal to testify on the ground that he is not assured of immunity as the *Regan* case petitioner was.

Throughout this litigation in all of the Courts below it has apparently been assumed, both by all of the Courts and by the parties, that the same New York State immunity legislation which was involved in *Regan* v. *New York*, 349 U.S. 58, is also involved in this case. This assumption is incorrect, and the error is cardinal.

The State immunity legislation in the *Regan* case was N.Y. Penal Law § 381 *as it then existed* (New York Laws 1936, ch. 329) (quoted *infra*), an immunity statute of the "automatic" or self-executing type—i.e., it was a statute providing that testimony relating to bribery (or related crimes) could not be withheld on the ground of self-incrimination, but it conferred immunity from prosecution for any criminal activity revealed in such testimony. Because of the

applicability of that "automatic" or "self-executing" immunity statute in the *Regan* case, this Court in that case held that the petitioner there had no possible justification for refusal to testify on the ground of defectiveness in his waiver of immunity, inasmuch as the automatic statutory immunity must absolutely protect him if he testified, and the Court reasoned that this was true irrespective of the merits of the claim of defectiveness of the waiver of immunity—the only qualifying point which the Court there suggested being that if the waiver was not defective the loss of immunity "would be simply the result of a voluntary choice to waive an immunity provided by the State" (349 U.S. at p. 631).

In the instant case the New York immunity statutes which need to be considered are N.Y. Penal Law §381 *as amended* (New York Laws 1953, ch. 891, § 5) plus N.Y. Penal Law § 2447 (New York Laws 1953, ch. 891, § 1) (both of these statutes are quoted *infra*). These statutes are radically, and (for the purposes of this case) decisively, different from the New York immunity legislation in *Regan*. The statutes in the instant case create a system of discretionary and selective immunity. And, as will shortly appear, under these statutes the within petitioner Stevens must be regarded as being just as absolutely *unsure* of immunity, as the petitioner in *Regan* was deemed absolutely *sure* of such protection.

N.Y. Penal Law §381 (New York Laws 1936, ch. 329) as it stood at the operative times in the *Regan* case, read in pertinent part as follows:

> "* * * No person shall be excused from attending and testifying * * * upon any * * * proceeding * * *

> relating to or concerned with a violation of any section in this chapter relating to bribery * * *, upon the ground [of self incrimination]; but no person shall be prosecuted or subjected to any penalty or forfeiture for on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial."

The above quoted §381 as adopted in 1936 was amended for the first time by New York Laws, 1953, ch. 891, §5, effective September 1, 1953.* This amendment was part of a comprehensive overhauling of the New York State immunity legislation with the object of ending "immunity baths" under the automatic or self-executing type of immunity laws, and of setting up instead a system for selective or discretionary conferral of immunity in cases deemed appropriate by a "competent authority"; see the explanation of this fundamental legislative policy change in *People* v. *Laino*, 10 N.Y. 2d 161, 172, 218 N.Y.S. 2d 647, 656-657 (1961). The 1953 amendment of §381 (and of several other similar provisions in the Penal Law) was enacted by the New York Legislature in conjunction with the adoption of an entirely new provision, N.Y. Penal Law §2447. The *amended* §381 (which is still in force and is applicable here) reads in pertinent part as follows:

> "2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating

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* The troubles of the petitioner in the *Regan* case arose out of Grand Jury proceedings in March 1951, and October, November and December 1952 (349 U.S. at pp. 60-61).

to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

N.Y. Penal Law §2447, the basic new provision adopted in 1953 to establish the selective immunity procedure, will be quoted in full:

"Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in

producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of any of them in his official capacity, is a party when such court is expressly requested by the attorney general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce answer; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence at an injuiry or investigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full

membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon 24 hours prior written notice to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein. Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred on any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him."

Thus, by reading together the amended §381 and the provisions of §2447, we see that a Grand Jury bribery investigation (§381) is one in which the Grand Jury is "a competent authority * * * authorized to confer immunity" (§2447). And we see further that this selective immunity system involves certain definite procedural steps—the witness must refuse to answer on the ground

of self incrimination, the Grand Jury must be "expressly requested by the prosecuting attorney to order such person to * * * answer", the Grand Jury must then order the person to answer, the person must then comply with the order, and only after all of these steps "immunity shall be conferred upon him". The strictness with which the Legislature intended that these procedures must be followed is indicated by the above quoted sub-division 4 of section 2447—"Immunity shall not be conferred upon any person except in accordance with the provisions of this section".

The Court of Appeals of New York, in construing this §2447 and in contrasting it with the former "immunity bath" system (which was in effect at the operative times in the *Regan* case), has said:

> " * * * Complete immunity from prosecution may be obtained by a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted * * *, or by virtue of immunity provisions in our State Constitution * * * " (*People* v. *Laino*, 10 N.Y. 2d 161, 173, 218 N.Y.S. 2d 647, 657).

In the present case of petitioner Stevens, the factual and legal situation stands a long way removed indeed from any absolute assurance of immunity for Stevens under the detailed procedures of §2447. The only one of the required statutory steps which has occurred is that Stevens has refused to answer on the ground of self incrimination. But nothing else that is required by §2447 has happened in this case. The prosecuting attorney has not "expressly

requested'' the Grand Jury ''to order such person to * * * answer'' with a view to carrying forward the immunity-conferral procedure under §2447—on the contrary, the prosecuting authorities in this case are strenuously resisting any idea that Stevens in fact has or is going to have immunity. Nor, of course, has the Grand Jury taken the next statutorily required step of ordering Stevens to answer with a view to immunity conferral under §2447—again, to the contrary, the entire thrust of the respondents' position in this case has been and continues to be that Stevens is not going to be given immunity, he is being held to his alleged waiver of immunity.

Since the prosecuting authorities in this case have so firmly been adhering to their policy of non-immunity for Stevens, is it not going to require a profound policy reconsideration on the part of those authorities before they might ever make a policy turnabout in favor of recommending to a Grand Jury an immunity-conferral on Stevens? And is it not therefore altogether unrealistic to say that by virtue merely of the existence on the New York State statute books of Penal Law §2447 Stevens is even so much as speculatively ''assured'' of the kind of immunity protection that was deemed decisive in the *Regan* case, much less absolutely assured thereof as Regan was held to be?

Also, who can say what a particular Grand Jury will do, regarding the hypothetical possibility of a future prosecutor's recommendation or request that the §2447 selective immunity procedures be applied to Stevens? Is it to be assumed that New York State Grand Juries will pre-

dictably be mere puppets of the prosecuting authorities? Is that what the Legislature of New York had in mind when it so elaborately defined (in §2447) the conditions under which a Grand Jury might qualify as a "competent authority" for the conferral of the potent new selective immunity that the Legislature wanted in place of the prior "immunity bath" system?

If §2447 means that Grand Juries are puppets of prosecuting attorneys, then do we not face the further distressing problem—and it is a problem of constitutional dimension—that the dread power of immunity-conferral, the power of wiping out a citizen's independent choice as to exercise of his privilege against self incrimination and of being let alone when he chooses to remain silent in reliance upon this great privilege, is a power which in New York State Grand Jury proceedings is at the untrammeled disposal of every zealous local prosecutor?

In short, the problems of constitutional policy and constitutional procedure (both State and Federal) which are projected by any such idea as that the present Stevens case is the same as the *Regan* case in point of a supposed identity of the respective New York State immunity provisions involved, are problems of a dizzying complexity and of a deeply disturbing character in constitutional terms.

There was a good, old-fashioned simple sort of indubitably "automatic immunity" in the *Regan* case, and that circumstance was deemed by this Court to be dispositive of Regan's claim that he was afraid to testify because he was not sure he would have immunity. But here, there is

at best some kind of remote and speculative possibility that Stevens may get immunity under §2447—indeed, as above suggested, every realistically likely indication is that the last thing which the respondents in this case (or rather the prosecutive authorities involved) are planning for Stevens is a conferral of immunity from prosecution.

In its decision in the *Regan* case this Court revealed, we think, a perfect awareness of the exact impingement of the New York immunity legislation which was there involved, and of the possible implications of the New York statutory change which had come into effect during the course of the later stages of the *Regan* litigation—though not early enough to affect the decision in that case. Thus, in its initial reference to N.Y. Penal Law §381 in the form in which it existed for the operative purposes of the *Regan* case, this Court commented that it was referring to that statute "as it existed at the time of this case" (349 U.S. at p. 59) and in an immediately accompanying footnote the Court said, of §381 and certain similar New York State automatic immunity provisions, that "these statutes have since been amended. New York Laws 1953, ch. 891" (349 U.S. at p. 59, fn. 2).

Throughout its opinion in the *Regan* case this Court kept emphasizing the point that §381 ("as it existed at the time of this case") stripped the petitioner of justification for refusal to testify, because "The immunity statute is crucial in this case because it removed any possible justification which petitioner had for not testifying. * * * The statute would have provided him with immunity * * * and thus his testimony could not possibly have been self incriminatory"

(349 U.S. at p. 62)*; and because the question of whether the waiver of immunity (in *Regan*) was valid or invalid "is irrelevant to the disposition of this case for on either assumption the requirement to testify, imposed by the grant of immunity, remains unimpaired" (349 U.S. at p. 62); and because "If the waiver is invalid, the immunity from prosecution persists" (349 U.S. at p. 64). Likewise in the concurring opinion of Mr. Chief Justice Warren in *Regan* (joined by Mr. Justice Clark) it was stated that, "This Court has never held that a State, in the absence of an adequate immunity statute, can punish a witness for contempt for refusing to answer self incriminatory questions. A case involving such facts has never been presented here. Nor is this such a case, since New York, by §381 of the Penal Law, has granted immunity" (349 U.S. at p. 65).

We therefore submit that the 1953 change in the New York State immunity legislation renders the *Regan* decision wholly inapplicable to the facts of this case.

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* At this point in the opinion the Court had a footnote reading, "Petitioner does not challenge the sufficiency of the immunity provided" (349 U.S. at p. 62, fn. 7). As amicus curiae we here respectfully urge that the "immunity provided" for Stevens is definitely insufficient, not only because the statutory (§ 2447) immunity is merely remote and speculative as above stated, but also because the only other possible "immunity" (the non-statutory "immunity" discussed in our Point II, *infra*) is unquestionably insufficient to confer immunity against Federal prosecution within the meaning of *Murphy* v. *Waterfront Commission*, 378 U.S. 52.

POINT II

Petitioner Stevens' justification for refusal to answer is not diminished by the decisional rule of law in the New York State Courts that the compelling of Grand Jury testimony on the part of a prospective defendant works a violation of the privilege against self incrimination and raises up a limited form of "immunity."

In our Point I, *supra,* we have aimed at showing that petitioner Stevens does not enjoy, under the presently operative New York State immunity statutes, that kind or degree of assurance of immunity which this Court found in the *Regan* case. In this Point II our purpose is to show that petitioner Stevens likewise does not have, for the purposes of this case, any such assurance of immunity merely by virtue of the New York rule of decisional law referred to in the above point heading.

The most recent and the most comprehensive decision of the Court of Appeals of the State of New York dealing with the rule of decisional law in question—that the compelling of Grand Jury testimony from a prospective defendant violates the privilege against self incrimination and works a limited "immunity" result—is *People* v. *Laino,* 10 N.Y. 2d 161, 218 N.Y.S. 2d 647 (1961). Two years prior to the *Laino* case the New York Court of Appeals had reenunciated the foregoing rule and had affirmed an order dismissing an indictment returned by a Grand Jury which had compelled testimony from a prospective defendant. *People* v. *Steuding,* 6 N.Y. 2d 214, 189 N.Y.S. 2d 166. The *Steuding* decision had left open the question of whether, beyond the dismissal of the particular Grand Jury indictment

thus obtained, it must also be concluded that such a prospective defendant who had thus been compelled by a Grand Jury would thereby become cloaked with a plenary immunity for all possible future re-indictments deriving from the same Grand Jury subject matter of testimony of the witness. In the *Laino* case, *supra,* the Court of Appeals carried the *Steuding* principle one step further—but only one step further. For the Court of Appeals in *Laino* held that a person who (being a prospective defendant) had been compelled to testify before a Grand Jury concerning a particular area of crime-investigation (violation of municipal competitive bidding requirements), was entitled to dismissal of an indictment for income tax evasion deriving from that same Grand Jury-compelled testimony. In other words, *Laino* held that there did arise from such Grand Jury-compelled testimony a form of "automatic immunity" which went beyond immunity from prosecution for the particular subject matter of the Grand Jury investigation. However, the New York Court of Appeals in the *Laino* case went to very explicit pains to make it clear that this was not "complete immunity". The Court in *Laino* noted that the selective immunity under §2447, and the decisionally enunciated (constitutionally-founded) immunity mentioned in the *Steuding* case as attaching to a prospective defendant who had been compelled to testify before a Grand Jury, were wholly distinct and separate from each other. Thus, referring to the *Steuding* rule, the Court said, "This, however, is a different thing entirely from complete immunity, and re-indictment is possible if sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant, is adduced to support it * * *. Complete immunity from prosecution may be obtained by

a prospective defendant, or any witness, only by strict compliance with the procedural requirements of our immunity statutes properly enacted [*viz,* N.Y. Penal Law §2447 plus, e.g., §381], or by virtue of immunity provisions in our State Constitution" (10 N.Y. 2d at p. 173).* The Court in *Laino* then went on to hold that the tax-evasion indictment must be dismissed.

And that was all that the Court held in the *Laino* case. It did not hold that Laino got complete immunity for all matters concerning which he had testified before the Grand Jury. In order to have got that complete kind of immunity, in other words, Laino would have had to receive the benefits of the selective and discretionary immunity procedures of N.Y. Penal Law §2447.

The New York decisional rule of constitutional law with which the *Steuding* and *Laino* cases were concerned, then, gives a man nothing more than the right to obtain dismissal of an indictment or indictments which are traceable to his Grand Jury-compelled testimony. If the prosecuting authorities can develop "sufficient evidence, independent of the evidence, links, or leads furnished by the prospective defendant" in his Grand Jury testimony, he does not have that complete immunity which he would have under §2447.

And in fact Mr. Laino himself lived to experience the harsh reality of this limited "immunity" of the *Steuding-Laino* rule. For he was subsequently re-indicted, and his efforts at seeking relief against this renewed State prosecution proved fruitless both in direct review proceedings (including a certiorari application in this Court) and in

* The second of the above two quoted sentences has previously been quoted in this brief in another connection.

Federal habeas corpus proceedings; the judicial history of Laino's further ordeal is recited in *United States ex rel. Frank Laino* v. *Wallack*, 231 F. Supp. 733 (S.D.N.Y. 1964).

We therefore submit that the *Steuding-Laino* rule, any more than the supposedly or potentially "available" selective immunity provisions of N.Y. Penal Law §2447, does not hold forth to the within petitioner Stevens any constitutionally cognizable prospect (for the purposes of this case) of that kind of absolute and complete immunity which this Court deemed decisive in the *Regan* case.

But this is not all—as regards the question of the *Federal* constitutional effectiveness of the *Steuding-Laino* rule for the purposes of the present case, i.e., for the purpose of determining whether the supposedly "available" "immunity" of petitioner Stevens on the present record equals or sufficiently approximates the absolutely dependable New York State immunity which was deemed decisive in *Regan*. Petitioner Stevens' brief on the merits in this Court points out the larger significances of *Malloy* v. *Hogan*, 378 U.S. 1, as calling for a reconsideration of the impact of *Regan* on the basic constitutional issue in this case of whether State constitutional or statutory discrimination against public employees in the matter of their constitutional privilege against self incrimination is to be countenanced any longer. The supplemental thought which we, as amicus curiae, would now respectfully propose for this Court's consideration in connection with this theme as to the larger effects of *Malloy* v. *Hogan* is, that additional attention should be directed also to the companion (with *Malloy*) case of *Murphy* v. *Waterfront Commission*, 378 U.S. 52, in the following respects:—The *Murphy* decision

held, in essence, that a State grant of immunity is constitutionally inadequate unless it results in plenary protection against Federal as well as State incrimination. The *Murphy* doctrine may be formulated (if we may so put it) as a doctrine of the mutualizing of the requirements of State and Federal immunity-conferrals. It is therefore of the utmost interest, we think, that in the comparatively brief time since the *Murphy* and *Malloy* decisions authoritative Federal judicial spokesmen have declared, in the most express manner, that the New York State *Steuding-Laino* rule—whereby a New York State Grand Jury prospective defendant receives some measure of State immunity by reason of being compelled to testify—is, in effect, of no interest to Federal courts or to Federal prosecutive authorities. Thus, in *United States* v. *Winter*, 348 F. 2d 204 (C.A. 2 1965—opinion by Weinfeld, D.J. sitting by assignment with Circuit Judges Moore and Anderson), the Court of Appeals for the Second Circuit announced with almost indignant emphasis that New York's *Steuding-Laino* rule is not the rule in Federal criminal law enforcement, i.e., that Federal Grand Jury investigations are not subject to the potential infirmity of losing their "prospective defendants" through a legally automatic conferral of some degree of immunity by virtue of the mere act of compelling the witness to appear and testify. Of even more direct import in this connection is *United States* v. *Interborough Delicatessen Dealers Association, Inc.*, 235 F. Supp. 230 (S.D.N.Y. 1964—Levet, D.J.), decided very shortly after the *Murphy-Malloy* decisions of this Court, holding that the New York *Steuding-Laino* rule of "immunity" does not meet Federal Fifth Amendment standards and consequently cannot raise up a mutualized Federal-State immunity.

The point of all of this last discussion of ours concerning the *Steuding-Laino* rule vis a vis the *Murphy-Malloy* principles is that—in view of (and since) the decisions in the *Murphy* and *Malloy* cases—the question of whether the within petitioner Stevens possesses anything even remotely resembling the absolutely assured immunity protection which this Court deemed decisive in the *Regan* case, is a question which cannot be satisfactorily resolved without considering in the most thorough manner the problem of mutualization of Federal and State immunity. What could be more obvious than that petitioner Stevens, had he testified before the Grand Jury without receiving a *complete* Federal-State immunity, would have faced the altogether realistic danger of Federal criminal prosecution under the income tax statutes, as just one example of the "reasonable fear of Federal incrimination" which he could justifiably entertain—not to mention the imponderables of potential prosecution for other Federal crimes such as conspiracy, and whatnot. Cf. *Mills* v. *Louisiana*, 360 U.S. 230.

And still even this is not all, for in the suggestions which we are now to offer (and in which we shall have to touch with some slight repetition on one or two of the themes already above mentioned) it will be apparent, we venture to say, that even if this were a case which hinged upon some kind of realistically imminent "availability" of the selective immunity procedures of N.Y. Penal Law §2447 rather than hinging actually and only upon the even more parlous "available immunity" emanating from the *Steuding-Laino* rule, petitioner Stevens' "prospects" of a meaningful Federal-State mutualized immunity would scarcely be enviable:

As we read the *Malloy* and *Murphy* decisions of this Court, the law of self-incrimination and immunity-conferral in this country now is that the States, in these matters, are bound to comply with the standards of the Fifth Amendment. One necessary effect of the *Malloy* and *Murphy* decisions is that State law and State procedures in the conferral of immunity from prosecution (as a means of overriding a claim of the privilege against self-incrimination) will have to satisfy the standards of the Fifth Amendment, the same as Federal statutes and processes for such immunity conferral must satisfy the standards of that Amendment. The *Murphy* and *Malloy* decisions did not indicate how this process of testing out the Federal constitutional adequacy of State immunity procedures would be approached in future cases, but it is not too difficult to foresee the general direction that such developments must inevitably take. The essential holding of *Murphy*, as we above said, is that a State grant of immunity is constitutionally inadequate unless it results in plenary protection against Federal as well as State incrimination. One obvious result of his holding is that the immunity conferral powers of the States have now become immeasurably more potent than was true prior to the *Murphy-Malloy* decisions because it now lies within the power of State immunity conferral agencies to tie the hands, so to say, of the Federal prosecuting authorities every time the State agency sees fit to exercise its own State immunity processes upon an individual. This, in turn, makes it not at all difficult to foresee that diligent and responsible Federal prosecuting authorities whose hands in any particular matter have been tied or supposedly tied by a State conferral of immunity will feel themselves in duty

bound to scrutinize with all closeness and circumspection the legal and constitutional adequacy of the State immunity procedure employed in the particular case, lest otherwise the area of Federal criminal law enforcement be whittled away by an indiscriminate process of procedurally slack or otherwise legally or constitutionally insufficient State-immunity conferrals. It may be foreseen as an indubitable certainty, then, that in many instances in the future Federal prosecuting authorities will feel themselves called upon to examine closely into the question of whether particular State conferrals of immunity are not only in compliance with the Federal Fifth Amendment standards in the sense in which the Federal Government's own immunity conferrals must obey those standards, but also, from the standpoint of whether the State immunity is, taken in its overall procedural and legal character, of such a quality as to satisfy the following two tests: (1) Does the State immunity satisfy all of the requirements of the law of the State itself? (2) Is the State immunity process involved of such an all-around quality in point of legality and constitutionality (both State and Federal) as well as satisfying other policy requirements of Federal law enforcement, as to justfy the acceptance thereof by Federal prosecuting authorities and Federal courts for the purposes of wiping out the right of Federal prosecution?

For example, let us suppose that a particular State immunity statute allowed a State Grand Jury to confer immunity and it is shown in a particular case that the Grand Jury foreman alone, without the assent of the other grand jurors, had taken it upon himself to confer the immunity. This would involve a violation of the State law itself, rendering the immunity invalid, and thereupon it is obvious

that Federal officials and Federal courts would be justified and indeed obliged to treat such abortive conferral of State immunity as being ineffective to bar Federal prosecution.

Let us take another example: Let us suppose that there exists a State statute permitting any individual policeman to confer immunity upon any suspect in any informal police interrogation. Even supposing, further, that such a hypothetical State statute would be constitutional under the terms of the particular State Constitution hypothetically involved, is it conceivable that Federal prosecuting authorities and Federal courts would sit by and remain content with such a slack and indiscriminate State immunity-conferral process whose consequences would entail not only the prevention of State prosecution but also of Federal prosecution?

Cf. the language of Mr. Justice White's concurring opinion (in which Mr. Justice Stewart joined) in the *Murphy* case, *supra,* at 378 U.S. 98-99, where the vital interests of the Federal Government in preventing slack, indiscriminate or unauthoritative immunity-conferrals which would bar federal prosecution are emphasized.

As mentioned *supra,* in *United States* v. *Interborough Delicatessen Dealers Association Inc.,* 235 F. Supp. 230 (S.D.N.Y. 1964), the New York State "automatic" immunity under the *Steuding-Laino* rule was held not binding upon Federal prosecutive officials on the ground that the *Malloy-Murphy* decisions did not operate to thwart Federal prosecution through the Federal-State immunity-mutualization rule of those cases unless the particular State immunity satisfied Federal Fifth Amendment standards. Here, with a vengeance, has starkly appeared, and within a very short

time after the handing down of the *Malloy-Murphy* decisions, precisely the peril of which we have been speaking in these last paragraphs, i.e., the peril to a witness in State immunity-conferral proceedings that he may still face federal prosecution, the very "whipsaw" that the *Murphy-Malloy* cases were designed, it seems, to abolish.

We therefore respectfully submit that any supposedly available New York State immunity for petitioner James T. Stevens in this case, as supposedly being something which makes this case even remotely comparable to the *Regan* situation in point of some sort of absolutely assured immunity which supposedly destroys Stevens' justification for refusal to testify, is no more substantiated by the *Steuding-Laino* rule of the New York courts than by the herein relevant New York immunity statutes (N.Y. Penal Law §§381 and 2447) as contrasted with the pre-September 1953 New York legislation which was deemed by this Court to be decisive in the *Regan* case.

CONCLUSION

It is respectfully submitted that the judgments below in No. 210 and No. 290 should be reversed.

Respectfully submitted,

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